

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CURTIS LAMONT PARKS,

Defendant-Appellant.

UNPUBLISHED

August 14, 2003

No. 239728

Kent Circuit Court

LC No. 01-004747-FC

Before: Whitbeck, C.J., and Smolenski and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(f) (penetration by force or coercion), and was sentenced to fifteen to forty years' imprisonment for each conviction. We affirm.

Defendant first argues that he was denied his constitutional right to a jury drawn from a venire representative of a fair cross section of the community because of a computer "glitch." Defendant failed to preserve his challenges to the venire and the jury selection process because he did not object to the jury array before the jury was impaneled and sworn. *People v Hubbard (After Remand)*, 217 Mich App 459, 465; 552 NW2d 493 (1996). Therefore, defendant forfeited appellate consideration of the issue. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996).¹ Additionally, because defense counsel expressed satisfaction with the jury's composition, defendant has also waived this issue. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Defendant also argues that the prosecutor's racially discriminatory use of her peremptory challenges violated defendant's rights under the Equal Protection clause of the Fourteenth Amendment. Defendant has also forfeited and waived this issue. Defendant failed to raise this issue and did not develop a record below. Nor is it clear from the record that the prosecutor used her peremptory challenges in a discriminatory fashion. Because defendant failed to object or

¹ Defendant's reliance on *Hubbard* is misplaced. In *Hubbard*, unlike this case, defense counsel made an objection to the jury array before the jury panel was sworn. *Hubbard, supra* at 465. In this case, defense counsel not only failed to place any objection to the jury array or panel, he expressed his satisfaction with it on the record.

develop the record, he has forfeited this issue. *People v Vaughn*, 200 Mich App 32, 40; 504 NW2d 2 (1993). Further, because defense counsel expressed satisfaction with the impaneled jury, defendant has also waived appellate review of this issue. *Carter, supra* at 215.

Defendant also argues that his trial counsel was ineffective when he failed to object to the prosecutor's racially discriminatory use of her peremptory challenges. Because defendant failed to move for a new trial or an evidentiary hearing regarding his ineffective assistance claim, this Court's review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). We find no merit to defendant's argument.

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Kevorkian*, 248 Mich App 373, 411; 639 NW2d 291 (2001).

No ineffective assistance is evident from the existing record. This Court previously denied defendant's motion for remand, and no evidentiary record exists regarding defendant's ineffective assistance challenge. Further, the transcript of the jury voir dire does not provide any information regarding the allegedly faulty computer program and does not indicate the races of the jury venire or the impaneled jury. Nor does the record indicate that the prosecutor exercised her peremptory challenges to remove African-Americans from the jury because of their race. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Because there is no record of any wrongdoing, defendant has not sustained his burden of establishing that his trial counsel provided objectively unreasonable assistance, let alone unreasonable assistance that affected the jury's verdict. *Strickland, supra* at 687-688. Therefore, we find no merit to defendant's argument.

Defendant next argues that the trial court abused its discretion when it admitted into evidence a "mug shot" photograph of defendant that was prejudicial and had no probative value. Reviewing the trial court's decision to admit a photograph into evidence for an abuse of discretion, *People v Ho*, 231 Mich App 178, 187-188; 585 NW2d 357 (1998), we disagree.

In order to determine whether the trial court abused its discretion, this Court must determine whether the evidence is relevant pursuant to MRE 401, and whether the evidence, if relevant, should be excluded pursuant to MRE 403. *People v Mills*, 450 Mich 61, 66; 537 NW2d 909 (1995), modified and remanded on other grounds, 450 Mich 1212 (1995).

Evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *People v Campbell*, 236 Mich App 490, 503; 601 NW2d 114 (1999). Further, evidence that enhances a witness' credibility is material. *Mills, supra* at 69. "If a witness is offering relevant testimony, whether that witness is truthfully and accurately testifying is itself relevant because it affects the probability of the existence of a consequential fact." *Id.* at 72, referencing *United States v De Parias*, 805 F2d 1447, 1453-1454 (CA 11, 1986), overruled on other grounds, *United States v Kaplan*, 171 F3d 1351 (CA 11, 1999).

We conclude that the photograph was material because it enhanced the victim's credibility. The prosecutor introduced the photograph because it depicts defendant as being "rather tired" at the time of his arrest, and thus corroborates the victim's testimony that defendant fell asleep during the commission of a criminal sexual assault. Even though the fact that defendant fell asleep was itself uncontradicted, the jury was required to determine whether it found defendant's version of events or the victim's version of events more credible. Because the photograph enhanced the victim's credibility by making her seemingly farfetched testimony that defendant fell asleep during a criminal sexual assault more believable, it was both material and probative of the victim's credibility. Accordingly, we conclude that the challenged photograph was relevant.

MRE 403 governs the exclusion of relevant evidence and provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice" In *Sclafani v Peter S Cusimano, Inc*, 130 Mich App 728, 735-736; 344 NW2d 347 (1983), this Court explained the meaning of unfair prejudice as follows:

"Unfair prejudice" does not mean "damaging." *Bradbury v Ford Motor Co*, 123 Mich App 179, 185; 333 NW2d 214 (1983) [modified on other grounds, 419 Mich 550 (1984)]. Any relevant testimony will be damaging to some extent. We believe that the notion of "unfair prejudice" encompasses two concepts. First, the idea of prejudice denotes a situation in which there exists a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury. In other words, where a probability exists that evidence which is minimally damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect, a situation arises in which the danger of "prejudice" exists. Second, the idea of unfairness embodies the further proposition that it would be inequitable to allow the proponent of the evidence to use it.

Here, the photograph at issue is not merely "marginally probative" because its portrayal of defendant corroborates the victim's testimony that he was dozing off during one of the assaults, thereby enhancing the victim's credibility. Further, there is no danger that the jury would give this photograph undue or preemptive weight because it is not a photograph that would inflame the jury's passions to a degree that the jury would convict defendant on that basis. The mere fact that defendant looks sleepy in the photograph would not cause a jury to convict defendant. In addition, because the photograph does not inflame the jury's passion, and because a party may use photographs to corroborate a witness' testimony, *People v Jones*, 24 Mich App 702; 180 NW2d 818 (1970), it is not inequitable to allow the prosecutor to use this evidence. Thus, the photograph should not have been excluded under MRE 403 because its probative value was not substantially outweighed by the danger of unfair prejudice.

The trial court's decision to admit the challenged photograph did not constitute an abuse of discretion. The photograph was relevant and its probative value was not substantially outweighed by the danger of unfair prejudice. Accordingly, we find no merit to defendant's argument.

Affirmed.

/s/ William C. Whitbeck
/s/ Michael R. Smolenski
/s/ Christopher M. Murray